

SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

SUSSEX COUNTY COURTHOUSE
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GEORGETOWN, DE 19947

February 19, 2010

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**RE: Victor and Rita Hudson v. Sussex County Board of Adjustment
C.A. No. S09A-04-003 ESB
Letter Opinion**

Date Submitted: October 20, 2009

Dear Counsel:

This is my decision on Victor and Rita Hudson's appeal of the Sussex County Board of Adjustment's denial of their application for a special use exception to keep a mobile home on their property for their son. The Hudsons first filed an application with the Board for a special use exception to place a mobile home on their property on August 12, 2005. Their application was filed pursuant to the Sussex County Code, Chapter 115, Article IV, Subsection 115-210. This subsection allows a property owner to place a mobile home on his property for use as a single-family residence if it is necessary to meet an emergency or hardship situation and does not affect adversely the uses of adjacent and neighboring properties. The Hudsons sought to place a mobile home on their lot for their adult son, Steven Telthoester, and his wife and child. Steven suffers from a number of psychological and physical problems. The Hudsons already had a traditional home on their property that

they used. The Board approved the Hudsons' application and issued them a two-year permit. The Hudsons then placed a mobile home on their property and Steven and his family moved into it.

At the expiration of the two-year permit, the Director of the Sussex County Planning and Zoning Commission granted the Hudsons' request for a one-year extension of the permit. At the expiration of the one-year extension of the permit, the Director denied the Hudsons' request for a second one-year extension and told the Hudsons they would have to submit a new application for a special use exception to keep the mobile home on their property because a neighbor had complained about Steven. The Hudsons then filed an application with the Board for a special use exception to keep the mobile home on their property.

The Board held a hearing on January 5, 2009. Rita Hudson and five of her neighbors testified at the hearing. The Board also received several letters from Rita, letters from Steven's doctors, a hand-drawn survey of the Hudsons' property, letters from two neighbors, Mary Wright and Roberta Martin, indicating they had no objection to the Hudsons' application, a Delaware State Police News Release regarding the execution of a search warrant at Steven's mobile home, and pictures showing Steven working around his mobile home and at his parents' home.

Rita testified about Steven's disabilities and her belief that the mobile home did not adversely affect the uses of adjacent and neighboring properties. Ruby Brooks, a neighbor of the Hudsons, testified that she had no objection to the Hudsons' application. The other four witnesses all testified against the Hudsons' application. Mike Martin and Carla Sparks live together on a property next to the Hudsons. They testified about Steven's theft of

electricity from the Delaware Electric Cooperative and how it damaged their own electrical service and appliances. Martin and Sparks also testified that they believed that Steven was using and selling drugs. Their belief was based on seeing a constant flow of vehicles at all hours of the day and night going to and from Steven's mobile home. The other two neighbors, William Baker and Tom Huffman, testified that they did not want Steven living in their neighborhood because they thought he was selling drugs. The Delaware State Police Press Release stated that a search warrant was executed at Steven's mobile home as part of an investigation into the sale of marijuana and ecstasy. Steven and his wife, Samantha, and their son and a friend, Kyle Bitler, were in the mobile home at the time. The police found ecstasy tablets, marijuana and drug paraphernalia in the mobile home. Kyle, Steven and Samantha were arrested and taken into police custody. Their son was placed with a family member.

Bitler was charged with Possession with the Intent to Deliver Ecstasy, Maintaining a Dwelling for Keeping Controlled Substances, and Possession of Drug Paraphernalia. Steven was charged with Maintaining a Dwelling for Keeping Controlled Substances, Conspiracy in the Second Degree, Possession of Marijuana, Endangering the Welfare of a Child, and three counts of Possession of Drug Paraphernalia. Samantha was charged with Maintaining a Dwelling for Keeping Controlled Substances, Conspiracy in the Second Degree, Possession of Marijuana, Endangering the Welfare of a Child, and three counts of Possession of Drug Paraphernalia.

Steven and Samantha pled guilty to Possession of Marijuana and Possession of Drug Paraphernalia and were placed on probation. Bitler went to jail according to Rita Hudson.

The Board denied the Hudsons' application for a special use exception, reasoning that Steven's use of the mobile home to use and sell drugs would substantially affect adversely the uses of adjacent and neighboring properties. The Hudsons now appeal the Board's denial of their application for a special use exception to this Court.

STANDARD OF REVIEW

The Supreme Court and this Court repeatedly have emphasized the limited appellate review of the factual findings of an administrative agency. The function of the Superior Court on appeal from a decision of a Board of Adjustment is limited to whether the agency's decision is supported by substantial evidence and whether the agency made any errors of law.¹ Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.² The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings.³ It merely determines if the evidence is legally adequate to support the agency's factual findings.⁴ Absent an error of law, the Board's decision will not be disturbed where there is substantial evidence to support its conclusions.⁵

¹ *Janaman v. New Castle Co. Bd. Of Adj.*, 364 A.2d 1241, 1242 (Del. Super. 1976); *aff'd* 379 A.2d 1118 (Del. 1977); *General Motors Corp. v. Freeman*, 164 A.2d 686 (Del. 1960).

² *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994); *Battista v. Chrysler Corp.*, 517 A.2d 295, 297 (Del. 1986), *app. disp.*, 515 A.2d 397 (Del. 1986).

³ *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

⁴ 29 Del.C. § 10142(d).

⁵ *Dallachiesa v. General Motors Corp.*, 140 A.2d 137 (Del. Super. 1958).

DISCUSSION

I. *Res Judicata*

The Hudsons argue that the Board committed an error of law when it denied their second application for a special use exception without first finding that there had been a substantial change in the circumstances affecting the use of their property. Their argument is based on the Board's approval of their first application for a special use exception and the principle of *Res Judicata*. The Board approved the Hudsons' first application in 2005, finding that the Hudsons had proven a medical hardship justifying the placement of a mobile home on their property and that the mobile home would not substantially affect adversely the uses of adjacent and neighboring properties. *Res Judicata* is defined as "an issue that has been definitely settled by judicial decision."⁶ The principle of *Res Judicata* does apply to zoning cases and has resulted in the rule that ordinarily a board of adjustment has no power to reopen or review its decision by vacating, revoking, rescinding or altering it after it has been made.⁷ The purpose underlying the principle of *Res Judicata* is to bring finality to a board of adjustment's proceedings.⁸ The principle of *Res Judicata* is typically used to prevent a property owner whose application has been denied by a board of adjustment from filing a new application until there has been a substantial change in the circumstances or conditions affecting the property or in the proposed use or plans for the

⁶ Black's Law Dictionary 1312, (7th ed. 1999).

⁷ *Kollock v. Sussex County Bd. of Adjustment*, 526 A.2d 569, 572 (Del. Super. 1987).

⁸ *Id.*

use.⁹ The Hudsons use the Board's earlier findings and *Res Judicata* to conclude that the Board had to first determine that there had been a substantial change in the circumstances affecting the use of their property before denying their second application for a special use exception.

The Hudsons' argument does not recognize the plain language of Subsection 115-210, the temporary and conditional nature of the Board's approval under that subsection, and the applicant's burden of proof under that subsection. Subsection 115-210 states, in applicable part, as follows:

In order to provide for adjustments in the relative location of uses and buildings, to promote the usefulness of these regulations and to supply the necessary elasticity to their efficient operation, special use exceptions, limited as to locations described in this Article, and special yard and height, exceptions are permitted by the terms of these regulations. The following buildings and uses are permitted as special exceptions if the Board finds that, in its opinion, as a matter of fact, such exceptions will not substantially affect adversely the uses of adjacent and neighboring property:

A. Special Use Exceptions:

- (1) Temporary and conditional permits for a period not to exceed five years, such period to be determined by the Board, for the following uses, which are specified in each district:

Use of a mobile home as a single-family dwelling in any district to meet an emergency or hardship situation, such permit not to exceed two years. The Director may without requiring an application for a special use exception, grant an extension for an emergency or hardship situation previously approved by the County Board of Adjustment upon receipt of an affidavit from a doctor stating that the emergency or hardship situation still exists. Such extension may be granted annually as long as the emergency or hardship still exists.

The applicant for a special use exception has the burden of proving that the

⁹ *Id.*

proposed use of his property will not substantially affect adversely the uses of adjacent and neighboring properties. If the special use exception is for a mobile home, then the applicant must also prove that the mobile home is necessary to meet an emergency or hardship situation. A permit for a special use exception for a mobile home is “temporary and conditional” and limited to an initial two-year period of time. The Director may grant an extension of the permit if the applicant proves to him that the emergency or hardship still exists. The use of “may” connotes the voluntary, not mandatory or exclusive, set of options.”¹⁰ Given the plain language of Subsection 115-210, it is clear that the Board’s approval of a special use exception for a mobile home can expire as soon as two years, but no later than the time the Director refuses to renew it. Once this happens, the property owner no longer has a permit to keep the mobile home on his property. He must file a new application for a special use exception to retain the mobile home on his property and meet the applicable requirements for approval.

That is exactly what happened in this case. The Hudsons’ application for a special use exception was approved in 2005. In accordance with Subsection 115-210, a permit was issued for two years. The Hudsons requested a one-year extension in 2007. The Director granted this extension. The Hudson’s sought a second one-year extension in 2008. The Director denied this extension and told the Hudsons they would have to submit a new application for a special use exception. Thus, the Hudsons’ original two-year permit, which was extended for one year, expired in 2008 in accordance with Subsection 115-210, leaving the Hudsons with no right to keep the mobile home on their property. The Hudsons

¹⁰ *Elf Atochem North America, Inc., vs. Jaffari, LLC*, 727 A.2d 286, 296(Del. 1999).

then filed a second application for a special use exception. The burden was on them to prove that the mobile home was necessary to meet an emergency or hardship situation and that it would not substantially affect adversely the uses of adjacent and neighboring properties. The Board found that the Hudsons had not meet their burden of proof.

II. The Fair Housing Acts

The Hudsons argue that the Board violated their rights under the Fair Housing Act¹¹ and Delaware Fair Housing Act¹² when it denied their application for a special use exception. The Hudsons have misunderstood the nature of the proceedings before the Board, the Court's limited role when hearing an appeal of a Board decision, and their remedies for an alleged violation of their rights under the Fair Housing Act and Delaware Fair Housing Act.

The Board has the authority to hear applications for special use exceptions.¹³ A special use exception allows a property owner to use his property in a way which the zoning ordinance expressly permits under conditions specified in the zoning ordinance.¹⁴ The Board may grant a special use exception if it finds that the exception will not substantially affect adversely the uses of adjacent and neighboring properties.¹⁵ A special use exception for a mobile home to be used as a single-family dwelling must be necessary

¹¹ 42 U.S.C. §§ 3601 - 3631.

¹² 6 *Del.C.* §§ 4600 - 4619.

¹³ Sussex Cty. C. § 115 - 209.

¹⁴ Blacks Law Dictionary 1406, (7th ed. 1999).

¹⁵ Sussex Cty. C. § 115 - 210.

to meet an emergency or hardship situation.¹⁶ Thus, there are two criteria that the Board must apply when considering an application for a special use exception for a mobile home. The mobile home must be necessary to meet an emergency or hardship situation and it must not substantially affect adversely the uses of adjacent and neighboring properties. The Court's role on appeal is limited to determining if the Board's decision is in accordance with the applicable law and supported by substantial evidence in the record.¹⁷ The Board, when considering an application for a special use exception for a mobile home, simply has no authority to consider an alleged violation of the fair housing acts. Similarly, the Court has no authority to consider the alleged violation on appeal.

The purpose of the Fair Housing Act and Delaware Fair Housing Act is to eliminate discrimination in housing.¹⁸ The remedy for a violation of these acts is to file a complaint with the Secretary of Housing and Urban Development¹⁹ or the Delaware Human Relations Commission. A person may also file a civil action in Federal or State Court.²⁰ Thus, if the Hudsons wish to pursue an alleged violation of their rights under the fair housing acts, then they need to pursue them with the appropriate Federal and State agencies and/or file a civil action in the appropriate court.

¹⁶ Sussex Cty. C. § 115 - 210(A)(1).

¹⁷ *Janaman*, 364 A.2d at 1242.

¹⁸ 42 U.S.C. § 3601; 6 *Del.C.* § 4601(a).

¹⁹ 42 U.S.C. § 3610; 6 *Del.C.* § 4610.

²⁰ 42 U.S.C. § 3613; 6 *Del.C.* § 4613.

III. Substantial Evidence

The Hudsons argue that there is not substantial evidence in the record to support the Board's finding that granting a special use exception to keep the mobile home on their property would substantially affect adversely the uses of adjacent and neighboring properties. The applicant for a special use exception carries the burden of proving that the proposed use will not adversely affect the uses of adjacent and neighboring properties.²¹ The Board found that Steven, his wife and a house guest were using the mobile home to use and sell drugs. These activities are illegal.²² Steven and his wife also engaged in these activities in front of their child, which is also illegal.²³ These activities also led to the execution of a search warrant by the Delaware State Police at the mobile home. This led to the arrest and conviction on drug charges of Steven, his wife, and their house guest. Four neighboring property owners who were aware of these activities objected to them. There can be no doubt that the illegal use and sale of drugs substantially affects adversely the uses of adjacent and neighboring properties.

The Board found that the Hudsons failed to prove that Steven's use of his mobile home to use and sell drugs did not substantially adversely affect the uses of adjacent and neighboring properties. The Hudsons' evidence focused only on the presence of other mobile homes in their area and the fact that three of their neighbors did not object to the mobile home remaining on their property. The Hudsons did not, and could not, contest the

²¹ *Rollins Broadcasting of Delaware, Inc., v. Hollingsworth*, 248 A.2d 143 (Del. Super. 1968).

²² 16 *Del.C.* §§ 4751 - 4768.

²³ 11 *Del.C.* § 1102.

fact that Steven and his wife had used drugs in their mobile home. They also did not offer any evidence that Steven's use of drugs did not substantially adversely affect the uses of adjacent and neighboring properties. Thus, the fact that there were other mobile homes in the neighborhood was of little consequence to the Board. The Board's decision is in accordance with the applicable law and supported by substantial evidence in the record.

CONCLUSION

The Sussex County Board of Adjustment's decision is affirmed for the reasons set forth herein.

IT IS SO ORDERED.

Very truly yours,

E. Scott Bradley